SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 73-904

CASWELL DEBERRY - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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IN THE

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No. ————

CASWELL DEBERRY - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

The petitioner, Caswell DeBerry, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Kentucky Court of Appeals.

OPINION BELOW

The opinion of the Kentucky Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The Judgment of the Kentucky Court of Appeals was rendered on June 29, 1973. A timely petition for rehearing was overruled on October 26, 1973. This Petition for Writ of Certiorari was filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the Trial Court erred when it overruled petitioner-appellant's motion to suppress the evidence of his arrest, the search of the truck in which he was arrested and the seizure of the tires which were located in the truck.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secured in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 10 of the Constitution of the Commonwealth of Kentucky provides:

> The people shall be secured in their persons, houses, papers and possessions, from unreasonable search and seizure; and no warrant shall issue to search any place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

STATEMENT OF THE CASE

Between 5 p.m., November 19, 1970 and 10 a.m., November 20, 1970 an outbuilding belonging to Motor Parts Depot, Louisville, was broken into and an estimated one hundred twenty-six (126) tires were stolen

(Transcript of Evidence, pp. 64-65, hereinafter referred to as T.E.). At approximately 9 p.m. on November 20, 1970 the petitioner with others, was arrested and charged with Knowingly Receiving Stolen Property, namely forty-two (42) tires (T.E., pp. 77, 80). Thereafter, the case was "filed away" in Louisville Police Court on June 7, 1971 because of the death of an arresting officer. It was not until January, 1972 that the matter was submitted to the Jefferson County Grand Jury (Transcript of Record, p. 2, hereinafter referred to as T.R.). On April 18, 1972 the case was filed away with leave to reinstate for lack of prosecution (T.R., p. 7). Then, on April 20, 1972 the case was reinstated (T.R., p. 8).

On October 4, 1972 petitioner was heard on his Motion to Suppress Evidence, which motion was overruled (T.E., pp. 40, 58). Trial commenced on that date, wherein the jury returned a verdict of guilty and fixed petitioner's sentence at three (3) years (T.E., p. 134).

At the hearing on petitioner's Motion to Suppress Evidence, Sgt. David Davis testified that the desk man in the Detective Bureau had received a telephone call alleging that stolen tires were in a truck located in an alley, behind a home in the 900 block of East Madison (T.E., pp. 4, 14). However, Officer Eugene Roberts, one of the two initial arresting officers testified that they were not given any specific information prior to the stake out, except that they were to look for stolen property. No description of the property was given to

him by the Commanding Officer, Sgt. Davis (T.E., pp. 8, 10).

At approximately 9 p.m. on November 20, 1970 the petitioner, with another, was stopped by Officer Roberts and his partner, now deceased, as he was egressing from an alley in the rear of the 900 block of East Madison Street, Louisville (T.E., pp. 9, 14). The petitioner was a passenger in a pannel truck at the time of his arrest.

Sgt. Davis testified that the information which he received was "that there was a truck parked at this particular location and that it was loaded with tires, and that they had come out of a breakin on College Street" (T.E., p. 17). There was a truck parked in the back yard of a house in the 900 Block of East Madison, which was described by Officer Roberts as an old green truck (T.E., p. 5). However, the truck which the petitioner was riding in was a rental truck and had only been in the alley for "about twenty (20) minutes" according to earlier testimony given by Officer Roberts in a Police Court Hearing (T.E., p. 27). At the time of the arrest the driver of the truck had not committed any traffic offenses according to Officer Roberts, the arresting officer (T.E., p. 9).

REASONS FOR GRANTING THE WRIT

The fundamental question presented the Courts from the commencement of this lawsuit was whether the arresting officers had grounds, or probable cause, to arrest, or even stop the petitioner. Considering the testimony of the arresting officer, Eugene Roberts, and

other related testimony, the petitioner contends that there was no *lawful* reason, or probable cause, to stop the vehicle in which he was riding the night of his arrest, November 20, 1970.

Officer Roberts testified that he and his partner, Ray Oyler, now deceased due to a traffic accident, received an order from Sgt. David Davis, their immediate superior, to surveil a house in the 900 block of East Madison Street, Louisville, Kentucky. Officer Roberts testified that

> We had received information from our Commanding Officer through the switchboard that a shipment of stolen property was housed in a—at a home in the rear of 900 East Madison and that it would be moved that night. And we staked out the location and when this truck left the location, well, we stopped it at the mouth of the alley (T.E., p. 4).

Officer Roberts testified further that he did not know what stolen property the officers were to be looking for, not even at the time the arrest was effected. His only knowledge was that "it was supposed to be stolen property" (T.E., p. 8). The officers also had no knowledge about who was involved in the matter (T.E., pp. 9, 10).

At the hearing, testimony was adduced that a telephone communication was received by the officer working the desk that stolen property was located at a house in the 900 block of East Madison, Louisville, Kentucky. A description of a particular house was apparently given (T.E., pp. 4, 13-16). At approximately 6 p.m. on

November 20, 1970 Officer Roberts and his partner, with others, were assigned to surveil the area in question (T.E., p. 6). Apparently, the various officers exchanged locations during this surveillance (T.E., p. 6). About the hour of 9 p.m., that same evening, Officer Roberts received a radio communication from Detective Kenneth Newcomb that a truck was moving out of the alley adjacent to the point of Roberts' surveillance position (T.E., pp. 8, 78). Roberts and his partner stopped the truck by blocking the mouth of the alley (T.E., p. 3). It was only after the arrest was effected that Roberts was able to determine that the truck contained some forty-two (42) tires which were later alleged to have been stolen from Motor Parts Depot (T.E., p. 10).

Sgt. Davis, through his testimony at the hearing, stated that he "had information from the detective desk that it (the truck) was loaded with tires from a break-in on College Street" (T.E., p. 18). Curiously enough, however, this significant information was not communicated to the other men on surveillance detail. As previously indicated, Roberts testified that he was not aware what the "stolen property" was supposed to be (T.E., p. 10). This testimony was reaffirmed by Roberts, at trial (T.E., p. 105).

Equally curious are the various descriptions of the truck parked in the yard of the house under surveillance. Roberts testified that the truck in the yard was a "green old truck" (T.E., p. 5). Davis testified that it was a "white panel truck parked well up into a yard" (T.E., pp. 19-20).

One fact which is undisputed in this case is that no officer corroborated *whatever* information was received by the desk man. Officer Roberts testified that he and his partner rode through the alley in question, saw a truck parked in a yard and went on to park further down the alley (T.E., p. 6). They later were relieved at that position by Detective Newcomb, and they moved on to an adjacent street (T.E., p. 26). Davis testified that he did not even go through the alley because he feared that he could "blow the whole operation" (T.E., p. 17). In point of fact no suspicious activity was viewed during the entire surveillance operation (T.E., p. 9).

In sum and substance, the arrest of this petitioner was based upon a telephone message received at the Detective Bureau, which may or may not have given particulars about stolen property to be moved from a location in the 900 block of East Madison. If particulars were given, it is apparent that they were not communicated from the Commanding Officer, Sgt. Davis, to his men. Thereafter, without any corroboration, except that a truck was parked in the alley for twenty(20) minutes, the police officers moved in and effected an arrest of the occupants of the vehicle. The immediate arresting officer did not even know what he was to be watchful for, once they stopped the truck in the alley.

The petitioner submits to this Court that none of the facts and circumstances testified to and about at the hearing on the Motion to Suppress or at the subsequent trial established any reasonable grounds, or

more properly, any probable cause for the arrest of the defendant, and the subsequent search and seizure. Neither Sgt. Davis or Officer Roberts had any information from a responsible source on which they could base their investigation, and their later actions. They were acting upon a "tip", and no more. On examination both officers acknowledged that they were unable to corroborate, through independent investigation, any information which they received. They were simply on a "fishing expedition". It has long been established under the law that an arrest is never justified by what it subsequently turns up.

It is now, and has always been, the law that the facts necessary to uphold an arrest without a warrant must be sufficiently strong to support the issuance of a warrant for arrest. *Worthington* v. *United States,* 166 F. 2d 557 (1948). Moreover, in considering the lawfulness of an arrest without a warrant the question is whether law enforcement agents could have procured a warrant for the arrest of the person on the information which compelled them to act. *Government of the Virgin Islands* v. *Rijos,* 285 F. Supp. 126 (1968). More succinctly, the "probable cause" factor must exist preceding the arrest for the arrest to be upheld.

This Court in *Draper* v. *United States,* 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327 (1959), at page 313, has stated that:

> Probable cause exists where the facts and circumstances within the arresting officers' knowledge and of which they had reasonably trustworthy in-

> formation are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

In a case decided later that same year, *Henry* v. *United States,* 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959), at page 100-102, this Court stated:

> The requirement of probable cause has roots that are deep in our history. The general warrant, in which the name of the person to be arrested was left blank, and the writs of assistance against which James Otis inveighed, both perpetuated the oppressive practice of allowing the police to arrest and search on suspicion. Police control took the place of judicial control, since no showing of 'probable cause' before a magistrate was required. The Virginia Declaration of Rights adopted June 12, 1776, rebelled against that practice: . . . The Maryland Declaration of Rights (1776) was equally emphatic: . . . and see North Carolina Declaration of Rights (1776) . . .
>
> That philosophy later was reflected in the Fourth Amendment. *And as the early American decisions both before and immediately after its adoption show, common rumor or report, suspicion, or even 'strong reason to suspect' was not adequate to support a warrant for arrest. And that principal has survived to this day.*
>
> *Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough.* Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed . . . It is

> important, we think, that this requirement be strictly enforced, for the standard set by the Constitution protects both the officer and the citizen . . . *And while a search without a warrant is, within limits, permissible if incident to a lawful arrest, if an arrest without a warrant is to support an incidental search, it must be made with probable cause.* (Emphasis added.)

The facts of *Henry* v. *United States, supra,* are considerably stronger than the facts of the matter herein. In *Henry, supra,* FBI agents received information from the *defendant's employer,* implicating the defendant in an interstate whiskey shipment theft. After considerable surveillance the agents observed the defendant, on two (2) separate occasions, place cartons in his automobile. The defendant was stopped thereafter and he was heard to say, "It is the G's—tell him (you) just picked me up". Contraband, in the form of stolen radios was subsequently discovered.

In reversing the conviction, this Court stated at pages 103-104.

> . . . when the officers interrupted the two men and restricted their liberty of movement, the arrest, for purpose of this case, was complete. It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. *The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as Johnson* v. *United States,* 333 U. S. 10, 68 S. Ct. 367, 92 L. Ed. 436, *supra, holds.*

> It is true that a federal crime had been committed at a terminal in the neighborhood, whiskey having been stolen from an interstate shipment. Petitioner's friend, Pierotti, had been suspected of some implication in some interstate shipments, as we have said. But as this record stands, what those shipments were and the manner in which he was implicated remain unexplained and undefined. *The rumor about him is therefore practically meaningless. On the record there was far from enough evidence against him to justify a magistrate in issuing a warrant . . . Riding in the car, stopping in an alley, picking up packages, driving away—these were all acts that were outwardly innocent . . . To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better so the Fourth Amendment teaches, that the guilty sometimes go free than the citizens be subject to easy arrest.* (Emphasis added.)

The petitioner urges that at the time of his arrest the police lacked the sufficient probable cause to make an arrest. Officer Roberts had no personal knowledge of the case whatsoever, and was in the vicinity merely because he had been directed there by a superior officer. As argument, assuming there was, in fact, an informant, anonymous at this point, that informant was not known to Officer Roberts or Sgt. Davis, nor did they know if anyone in their office knew or knew of the informer. Their actions, by their own testimony, were based upon third, fourth of fifth hand in-

formation received by their office and relayed to them. All that they saw prior to the arrest of the appellant was a truck going down the alley. On this basis they set the arrest in motion. It should not be enough.

It is argued that the information in the possession of the police without more, was not sufficient to apply to a neutral magistrate for an arrest warrant because it would not sustain the burden of probable cause. There simply was not sufficient information with which to base an arrest. The events of the evening of November 20, 1970, which culminated in the arrest of Petitioner added no more to the aspect of probable cause. It was not until after the decision to arrest had been made; the arrest effected; and the subsequent search and seizure that any real evidence was adduced. This evidence should have been suppressed by the trial Court because it was the result of an arrest based upon "mere suspicion" and not probable cause, and was illegal.

The Supreme Court in *Beck* v. *Ohio,* 379 U. S. 89, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964), a case strikingly similar to this matter, stated at page 91:

> . . . The constiutional validity of the search in this case, then, must depend upon the constitutional validity of petitioner's arrest, whether that arrest was constitutionally valid depends in turn upon whether, *at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably*

trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offesense . . . 'The rule of probable cause is a practical, non-technical conception affording the best compromise that has been found for accommodating . . . often opposing interest. Requiring more would unduly hamper law enforcement. *To allow less would be to leave law-abiding citizens at the mercy of the officers whim or caprice.'* Brinager v. United States, 338 U. S. at 176, 93 L. Ed. at 1891.

(pp. 93-94) . . . As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer 'had a police picture of him and knew what he looked like,' and that the officer knew that the petitioner had 'a record in connection with clearing house and scheme of chance.' Beyond that, the officer testified only that he had 'information' that he had 'heard reports', that 'someone specifically did relate that information' and that he 'knew who that person was.' There is nowhere in the record any indication of what 'information' or 'reports' the officer had received or beyond what has been set out above, from what source the 'information' and 'reports' had come. The officer testified that when he left the station, 'I had in mind looking for (the petitioner) in the area of East 115th Street and Beulah, stopping him if I did see him make a stop on that area.' But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. Cf. Draper v. United States, 358 U. S. 307, 79 S. Ct. 329, 3 L. Ed. 2d 327. And the record does not show

that the officers saw the petitioner 'stop' before they arrested him or that they saw, heard, smelled, or otherwise perceived anything else to give them ground for belief that the petitioner had acted or was then acting unlawfully . . .

(pp. 96-97) An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, *and substitutes instead the far less reliable procedure of an after-the event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. 'Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed' Wong Sun* v. *United States,* 371 U. S. 471, 479, 480, 83 S. Ct. 407, 9 L. Ed. 2d 441, 450. Yet even in cases where warrants were obtained, the Court has held that the Constitution demands a greater showing of probable cause than can be found in the present record. Agular v. Texas, 378 U. S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723; Giordello v. United States, 357 U. S. 430, 73 S. Ct. 1245, 2 L. Ed. 2d 1503; Nathanson v. United States, 290 U. S. 41, 54 S. Ct. 11, 78 L. Ed. 159.

When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of arrest would 'warrant a man of reasonable caution in the belief' that an offense has been

committed. Carroll v. United States, 267 U. S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543, 555, 39 ALR 790. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function.

All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner. We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissable or entirely irrelevant upon the issue of probable cause . . . *But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will.*

It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for the petitioner's arrest. *But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerable more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible.* We may assume that the oficers acted in good faith in arresting the petitioner. *But 'good faith on the part of the arresting officer is not enough.'* Henry v. United States, 361 U. S. 98, 102, 80 S. Ct. 168, 4 L. Ed. 2d 134, 138.

If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police (Emphasis added).

In *Terry* v. *Ohio,* 302 U. S. 1, 88 S. Ct. 1869, 20 L. Ed. 2d 889 (1968), this Court at page 20 stated:

> . . . *We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, see e.q.,* Katz v. United States, 389 U. S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); Beck v. State of Ohio, 379 89, 96, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964); Chapman v. United States, 365 U. S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828 (1961), *or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances,* see e.q., Warden v. Hayden, 387 U. S. 294, 87 S. Ct. 1642, 18 L. Ed. 2d 782 (1967); Cf. Preston v. United States, 376 U. S. 364, 367-68, 84 S. Ct. 881, 884, 11 L. Ed. 2d 777 (1964) . . . *The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of particular circumstances.* And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or search 'warrant a man of reasonable caution in the be-

> lief' that the action taken was appropriate? Cf. Carroll v. United States, 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925); Beck v. Ohio, 379 U. S. 89, 96, 97, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). *Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches,* a result this Court has consistently refused to sanction. See, e.q., Beck v. Ohio, *supra;* Rios v. United States, 364 U. S. 253, 80 S. Ct. 1431, 4 L. Ed. 2d 1688 (1960); Henry v. United States, 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959).

There has been no mention in this case of the so-called "moving vehicle doctrine" as first enunciated in *Carroll* v. *United States,* 267 U. S. 132, 45 S. Ct. 280, 69 L. Ed. 543 (1925). However, anticipating that there may be an attempt to bring this "doctrine" into play in this matter, the petitioner wishes to call the Court's attention to the language of Mr. Justice Taft which should resolve that possible issue. At page 155, he states:

> . . . The measure of legality of such a seizure is therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he stops and seizes has contraband liquor therein which is being illegally transported . . .
>
> Such a rule fulfills the guaranty of the Fourth Amendment. In Cases where the securing of a warrant is reasonably practicable, it must be used, and when properly supported by affidavit, and is-

> sued after judicial approval, protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause (Emphasis added).

It should be noted that the National Prohibition Act, in effect in 1925, gave the agents specific authority to search without warrants. However, the language of Mr. Justice Taft is mandatory, where he stated that a warrant must be used where the securing of it is reasonably practicable. This mandate reflected the cognizance of the Court that the Act provided for searches without warrants. Still whenever practicable the Court mandated the warrant requirement as a protection against overzealous police action.

It would appear, in this case, that the police are seeking to practice their case by hindsight and are justifying the arrest of petitioner by the findings of their search after the arrest. The police had their, so-called, information for more than four (4) hours, with a stake out for three (3) hours, and yet there was apparently never any thought about securing a search warrant for the premises at 914 East Madison and for the vehicle that was supposedly there for a period of time. During the trial, Sgt. Davis testified that many officers participated in this surveillance, including officers Graham, Canuel, Rawlings, Newcomb, Alexander, Brown, Oyler, Roberts and himself (T.E., p. 78). In all, at least nine (9) officers were involved, according

to Davis. *Yet not one of these officers, or any other officers with the Louisville Division of Police was dispatched to seek, at least, a search warrant for the premise at 914 East Madison.* Petitioner submits that the reason for this failure was because they knew well that they did not have sufficient information to present to a judicial officer to justify the issuance of such a warrant. The availability of such an officer is not in issue since no attempt was made. The petitioner further submits that this Court could accept, as judicial notice, the fact that the police have no qualms, whatsoever, about calling upon a judge at all hours of the day and night for the issuance of warrants when they believe they have good cause and reasonable grounds.

In this vein, the petitioner calls the court's attention to *United States* v. *James,* 378 F. 2d 88 (6th Cir., 1967), where the agents had a three and one-half (3½) month old arrest warrant but no search warrant for the apartment. A large aggregation of enforcement officers were present for the arrest and subsequent search of the apartment. In reversing the conviction, the Court held at page 90:

> Since the agents had ample time to secure a warrant for her arrest, they obviously had time to secure a search warrant to search her residence, but did not obtain one. The offense for which the arrest warrant was issued took place on June 3, 1963. The arrest was not made until September 26, 1963, on a warrant obtained only one or two

days prior thereto. No explanation has been offered as to why the agents waited for more than three and one-half months after the offense had been committed, to obtain the arrest warrant.

The Government contends, however, that the only reliable information which it had was concerning violations which took place at the apartment on June 3, 1963, and July 9, 1963, and this information was too remote in time from September 26, 1963, to obtain a search warrant. *But the fact is that the narcotics agents made no attempt to secure a search warrant.*

Taking into account all of the admitted facts and circumstances of the case, including the large aggregation of agents and police officers, it seems to us that the agents and officers were interested in something more than merely making an arrest. It is clear that their primary purpose was to make a general exploratory search of the apartment, with the hope of finding narcotics. This search in our judgment, was unreasonable and violated the rights of appellant, James, under the Fourth Amendment of the Constitution. United States v. Harris, 321 F. 2d 739 (6th Cir., 1963).

The mere fact that the articles seized were contraband, does not make the evidence admissible where the search was conducted in violation of the Fourth Amendment. The owner of the contraband, however, was not entitled to have it returned. United States v. Jeffers, 342 U. S. 48, 72 S. Ct. 93, 96 L. Ed. 59 (1951).

It follows that the District Court erred in denying the motion to suppress. The judgment of

> conviction is reversed and the cause is remanded with instructions to grant the motion to suppress. (Emphasis added.)

The petitioner urges that *United States* v. *Harris,* 321 F. 2d 739 (6th Cir., 1963), is also similar in theory to the case before this Court. In *Harris, supra,* the District Judge initially overruled the defense motion to suppress certain evidence. On petition for rehearing the motion was sustained and the government appealed. In *Harris,* the agent had received information from an informant about the defendant having possession of a quantity of bulk narcotics. The agent made no effort to get a search warrant and he and seven (7) other agents went to the defendant's apartment. At page 741, the Court, in affirming the District Court's ruling, stated:

> In sustaining the motion to suppress the evidence the trial judge found from the evidence that the search was not an incident of arrest, but that it was the principal reason for the officers going to the defendant's apartment . . .
>
> An arrest may not be used as a pretext or subterfuge for making a search of premises without a search warrant where ordinarily one would be required under the Fourth Amendment. If, in fact, the primary purpose of forcibly entering a persons home is to search for evidence with which to convict him of crime, the evidence so obtained is not admissible in court. United States v. Lefkowitz, 285 U. S. 452, 467, 52 S. Ct. 420, 76 L. Ed. 877; Harris v. United States, 331 U. S. 145, 153,

67 S. Ct. 1098, 91 L. Ed. 1399; Abel v. United States, 362 U. S. 217, 225-26, 80 S. Ct. 683, 4 L. Ed. 2d 668; Jones v. United States, 357 U. S. 493, 500, 73 S. Ct. 1253, 2 L. Ed. 2d 1514; Worthington v. United States, 166 F. 2d 557, 566, C.A. 6; Taglavore v. United States, 291 F. 2d 262, 265, C.A. 9; See also Go-Bart Importing Co. v. United States, 282 U. S. 344, 51 S. Ct. 153, 75 L. Ed. 374; Henderson v. United States, 12 F. 2d 523; C.A. 4; Ker v. California, 374 U. S. 23, 83 S. Ct. 1623, 1635, 10 L. Ed. 2d 726.

All of the agents of the Narcotics Bureau who testified said that they went out to the defendant's apartment for the purpose of arresting him for violation of the narcotics laws. *The real purpose of the agents must be determined from all of the facts and circumstances surrounding the arrest of the defendant and the search of his apartment. The court is not bound to accept the purpose as stated by the agents as controlling.*

The record as a whole supports the conclusion of the trial judge that the search was the principal reason for the agents going to the apartment of the defendant . . .

(p. 742) There was a strong urge on the agents to make a case against this defendant but we cannot permit the law to be circumvented by expediency.

To give sanctions to a search such as was made in this case, would virtually nullify the provision of the Fourth Amendment that, 'The right of the people to be secure in their persons, houses . . . against unreasonable searches and seizures, shall not be violated . . .

> We conclude that the District Judge was correct in finding that the search of the defendant's apartment was the primary purpose of the agents in going to the apartment and making an arrest. In arriving at this conclusion, we established no new principle of the law. The question before the District Judge was a factual one to be decided solely on the particular facts of the case before him. We are of the opinion that the facts substantiate the trial judge's conclusion and we will not disturb it. (Emphasis added).
>
> The judgment of the District Court is affirmed.

In *Ballard* v. *Commonwealth,* Ky., 462 S. W. 2d 905 (1971), the Court extensively discussed the aspects of probable cause justifying arrests. In point of fact, the Court quoted extensively from this Court's decision in *Chambers* v. *Maroney,* 399 U. S. 42, 90 S. Ct. 1975, 26 L. Ed. 2d 419 (1970), which also delved deeply into the issue of probable cause. In *Chambers, supra,* the officers had descriptions of the individuals' dress and type of vehicle, including color to rely upon before initiating an arrest and subsequent search and seizure.

Chambers, supra, offers the Commonwealth no solace for here the arresting officer had no knowledge of what "contraband" he was looking for, let alone any description of a vehicle or identification of a suspect. Petitioner urges that it is questionable whether Sgt. Davis had any such information. If he did, he must have wanted to keep it to himself, which does not seem reasonable. Unquestionably, if Sgt. Davis did have the information he testified about, it is poor police

work, at best, to fail to give it to the other officers on the surveillance detail.

It must be assumed that a telephone call was made giving information about "stolen items" in a truck, at the general location in question. Which truck? It can be reasonably assumed that it was the truck in the yard which the caller was talking about. Even so, that information, without corroboration, is insufficient to arbitrarily stop a vehicle, even a truck at 9 p.m. in the evening. 9 p.m. is not a particularly suspicious time to be driving through an alley in a residential section. That time alone does not justify the stopping of a motor vehicle for a "fishing expedition".

Scamahorne v. *Commonwealth,* Ky., 376 S. W. 2d 686 (1964), represents yet another case involving probable cause. At page 687 the Court states:

> . . . It has been held that if the facts are such that an ordinary prudent man would have believed the accused guilty and would have acted upon that belief, a police officer's act in making an arrest without a warrant is justified . . . The arresting officer in felony cases *must act upon facts within his own knowledge, or upon reliable information communicated to him by a third person. Mere belief or suspicion does not constitute reasonable grounds.* (Emphasis added).

The Court in *Phillips* v. *Commonwealth,* Ky., 473 S. W. 2d 135 (1971), at page 137 states:

> . . . We concede that the law of this Commonwealth hold a search warrant necessary in order

> to search an automobile unless the officer has *probable cause* to search based upon reliable information or observation . . . We further concede that probable cause is the criterion normally followed in situations such as the one presently before us. *We* further concede that an arrest cannot be a pretext for an otherwise illegal search . . . (Emphasis added).

In this case, all that the officers had to base their arrest of the petitioner upon was an uncorroborated "tip" of unknown origin. They took no action to verify this information other than to set up a "stake-out". After a three to four hour wait someone saw a truck driving down an alley. As the Court said in *United States* v. *Davis,* 459 F. 2d 458, 459 (9th Cir., 1972). "These observations and suspicions do not sufficiently suggest that some criminal activity was afoot."

The trial court felt that the question of the legality of the arrest, search and seizure was close and so stated (T.E., p. 116). It is urged that the trial court did, in fact, err in its ruling on petitioner's Motion to Suppress Evidence.

The Kentucky Court of Appeals utilized *Terry* v. *Ohio,* 392 U. S. 1, 88 S. Ct. 1868 20 L. Ed. 2d 889, (1968) to buttress its opinion in this case. Petitioner urges that *Terry, supra,* in fact, favors the proposition which he puts forward. In *Terry, supra,* it was *the acts* of the defendants which aroused the officer's interest. It was, in fact, these same acts and the officer's extensive experience which caused this Court to affirm the conviction of Terry. In *Terry, supra,* the defen-

dants paced in front of the jewelry store window roughly 24 times, conferred several times, and were joined by yet a third person. At p. 23 the Court concluded, "It would have been poor police work indeed for an officer of 30 years experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further." Again, the arrests in *Terry, supra,* were based upon observations of suspicious behavior.

In the instant case, absent the anonymous phone call, there was not an iota of suspicious, questionable or even unusual behavior to arouse *any* officer's suspicions.

The Kentucky Court also cited *Bays* v. *Commonwealth,* Ky., 486 S. W. 2d 706 (1972); *Shull* v. *Commonwealth,* 475 S. W. 2d 469 (1971); and *Phillips* v. *Commonwealth,* Ky., 473 S. W. 2d 135 (1971) in support of its Opinion. In *each* of these cases the arrest was based upon facts which were suspicious, *in and of themselves,* and quite distinguishable from this case.

In *Bays, supra,* there was suspicious and furtive movements by the defendant(s), quite similar to the *Terry* case, *supra.* In *Shull, supra,* two (2) men were stopped in the immediate vicinity of the Sears Roebuck Store in the early morning hours, after the burglar alarm went off. The officer testified that one man started to run as the police car approached. Again, very similar to the *Terry* case, *supra.* In *Phillips, supra,* the arrest was also based upon suspicious circumstances and the acts of the defendant, *plus* the in-

formation provided the police by a hitchhiker personally at the police station.

The Kentucky Court cited the *Peters* case, contained in the opinion *Sibron* v. *New York,* 392 U. S. 40, 88 S. Ct. 1889, 20 L. Ed. 2d 817 (1968), in further support of its opinion. Here again, the defendant was arrested, as this court paraphrased, because an off-duty police officer observed the defendant conducting himself suspiciously outside of an apartment the officer knew to be occupied by someone other than the defendant.

Petitioner urges that *Whiteley* v. *Warden,* 401 U. S. 560, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), is particularly applicable to his case. The facts of that case are very similar to the instant case. This Court held that no probable cause existed for the arrest. In that case a Wyoming County Sheriff subscribed to a warrant against Whiteley on the basis of a "tip." Officers in another locale arrested Whiteley in a car on the basis of that warrant. This Court at p. 567-68 states:

> . . . The record is devoid of any information at any stage of the proceeding from the time of the robbery to the event of the arrest and search that would support either the reliability of the informant or the informant's conclusion that these men were connected with the crime.
>
> . . . The arresting officer was not himself possessed of any factual data tending to corroborate the informer's tip that Daley and Whiteley committed the crime. Therefore, petitioner's arrest

violated his constitutional rights under the Fourth and Fourteenth Amendments; the evidence secured as an incident thereto should have been excluded from his trial.

Petitioner considers the *Whiteley* case, *supra,* to be virtually undistinguishable from his case. In his case the officers were acting only on a "tip" and they did absolutely nothing to corroborate the information. Officer Roberts, the original arresting officer, obviously had no information whatsoever about what "stolen property" the police were looking for. Without some corroboration the officers had no right to stop the truck as it was moving down the alley. Nothing was in "plain view" at 9:00 p.m. when the truck was moving down the alley. It was only after the officers came abreast of the truck *on foot* that they saw tires. Even at that point Roberts, in effect, saw nothing because he had no knowledge of what he was looking for. Petitioner urges that it is difficult to give Davis' testimony about the tires the benefit of the doubt because of his obvious failure to communicate the "tire" information to the other officers. It seems inconceivable that he would assign nine (9) men to a surveillance for stolen property for more than three (3) hours, if he really knew what the stolen property specifically was, without telling the assigned officers what the property was. Logis dictates that he would have been more definitive about what the stolen property was if he had really known. Police surveillances, perhaps, may be based upon unknown quantities; arrests, however, cannot stand upon what turns up after a search. An arrest

and search is good or bad when it commences. Certainly, a bad search, i.e., a search in violation of the Fourth Amendment, cannot be made good by what it discloses. *Byars* v. *United States,* 273 U. S. 71 L. Ed. 520 (1927) 28, 29; 475 S. Ct. 248; *Henry* v. *United States,* 361 U. S. 98, 80 S. Ct. 168, 4 L. Ed. 2d 134 (1959), 104; *United States* v. *DiRe,* 332 U. S. 581, 595; 68 S. Ct. 222; 92 L. Ed. 210 (1948). Neither suspicion nor equivocal behavior alone justifies a search. *Agnello* v. *United States,* 269 U. S. 20, 33, 46 S. Ct. 4, 70 L. Ed. 145 (1925); *Jones* v. *United States,* 357 U. S. 493, 497, 78 S. Ct. 1253, 2 L. Ed. 2d 1514 (1958). *Terry, supra,* condoned the frisk type search for weapons not a full search—and that was based upon extremely suspicious activities of a defendant.

Petitioner urges that if this decision is allowed to stand, then the Court will open the door wide to possible abuses by overzealous law enforcement officers. It will then be simple for an officer to testify that he received an anonymous tip about an individual and thereafter stopped him. In effect, this Court will be taking the position that no corroboration is necessary to stop a vehicle if an officer received a "tip." In *Wong Sun* v. *United States,* 371 U. S. 471, 479, 83 S. Ct. 407, 9 L. Ed. 2d 441, 450, the Court held that the basis for an arrest without a warrant cannot be any the less stringent than the basis for an arrest with a warrant. Otherwise, it would obviously be more expedient for an officer to make warrantless arrests.

Again petitioner concedes that "tips" should be investigated. Investigation is the key. Probable cause

cannot be established on "information and belief" alone. Evidential facts must be set forth. *Marcus* v. *Search Warrants,* 367 U. S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961).

CONCLUSION

The Kentucky Court of Appeals, by its Opinion of June 29, 1973, in effect, has sanctioned the stopping of vehicles for investigation purposes only. The petitioner urges that such stops, without probable cause to believe that a crime has been committed, or is in the process of being committed, or unlawful and violative of the Fourth Amendment of the Constitution of the United States and Section 10 of the Constitution of the Commonwealth of Kentucky. Moreover, the petitioner submits that the decision of the Kentucky Court contravenes the established law of this Court as cited in the Petition herein.

The question presented by this Petition is of such importance to all the courts in the States, as well as the federal courts, that this Court should accept jurisdiction and issue a Writ of Certiorari to review the Opinion of the Court of Appeals of the Commonwealth of Kentucky.

Respectfully submitted,

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